

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

BRIAN P. BURNS,

Plaintiff and Appellant,

v.

THE NEIMAN MARCUS GROUP, INC.,

Defendant and Respondent.

A120378

(San Francisco County
Super. Ct. No. 457841)

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

THE COURT:

On the court's own motion, the opinion filed on April 28, 2009, is modified as follows:

- (1) On page 13 of the majority opinion, after line 10 and before section *B.*, add the following paragraph:

In light of our determination that a negligence cause of action does not lie, we do not reach Neiman Marcus's alternative argument that a negligence cause of action is preempted by the California Uniform Commercial Code.

- (2) On page 1 of the dissenting opinion, delete from the second sentence the words "or 3405, subdivision (b)".

There is no change in the judgment.

Dated:

William R. McGuiness P.J.